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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

THE CITIZENS NATIONAL BANK OF WACO, TEXAS

Petitioner,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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RESPONDENT'S OPPOSING BRIEF

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OPINIONS BELOW

There was no opinion delivered by the District Court except as contained in the Findings of Fact, (R. 36), the Conclusions of Law (R. 41), and the Judgment (R. 45).

The opinion delivered by the Circuit Court of Appeals is reported in 117 Fed. (2d) at page 852.

The opinion delivered by the Circuit Court of Appeals on former appeal is reported in 100 Fed. (2d) at page 807, and (rehearing) 101 Fed. (2d) at page 974, with respect to which certiorari was denied May 1, 1939 (303 U. S., 626, 59 S. Ct. 827, 83 L. ed. 1509).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 13, 1941 (R. 174). Petition for rehearing was filed January 29, 1941 (R. 175), and denied March 8, 1941 (R. 180). Petition for certiorari was filed April ...., 1941, and jurisdiction is invoked under 28 U. S. C. A., Sec. 347 (a), (Sec. 240 of the Judicial Code as amended) on the alleged ground that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions", with respect to a matter of alleged "wide public interest".

STATEMENT OF THE CASE

Respondent brought the suit against petitioner to recover a loss of $52,268.39 sustained by respondent as surety for Gibson Gayle, as Tax Collector, alleging that, of deposits on account of taxes made by him with petitioner, as County Depository, and by it credited to him as Tax Collector, they, and each of them, failed to account, according to law, for that sum; that, on the contrary, petitioner, in violation of statute, undertook to charge against the credits on account of the deposits amounts aggregating that sum that did not represent "payments to treasurers entitled to receive the same", or his compensation "as shown by his approved reports", or payments for any purpose authorized by law; that, on account thereof, he and petitioner and respondent, and

each of them, were obligated to pay the State $52,500; that respondent, as surety, paid the same under compulsion, and thereby satisfied their indebtedness, and became subrogated to the rights of the State, and thereupon demanded payment thereof from petitioner (R. 1-6).

Petitioner, by its answer, denied that it had failed to account, or was liable, for anything, and asserted that all sums credited by it on account of taxes deposited had been duly accounted for by it by payment of checks drawn by the Tax Collector, as such, and covering payments to treasurers, and for other purposes, including his commissions and fees, as shown by his monthly reports audited by the County Auditor, and approved by the County Clerk, and alleged that, of payments thus made to him, he deposited $18,603.45 in another bank to cover a shortage in his highway fund account; that respondent would otherwise have been liable for that shortage; that respondent had been surety for Gayle's predecessor; that both respondent and the State knew of the way in which the funds were being handled; that respondent had made no objection thereto; that Gayle, with acquiescence of the State, had failed to make payments weekly, as required by statute; that it had been customary for petitioner, and other depositories, to make payments on the signature of the collector, without more (R. 6-20).

The stipulated facts (R. 48-63) show, and the trial court found (R. 39, p. 10) that petitioner charged against deposits credited to the Tax Collector, as such, sums aggregating $131,199.36, on account of checks drawn by, and payable to, him, but not covering his compensation "as shown by his approved reports" (none having been approved by the Commissioners' Court, R. 59, Par. 18);

that (R. 38, Par. 9), of the credits on account of deposits received by petitioner, it (as well as Gayle) failed to account for $52,268.39, and that (R. 39, Par. 10) against the deposits received by petitioner, it "paid to, and for the account of, Gibson Gayle, sums aggregating $131,-199.36, and charged the same against" the credits therefor "when his reports had not been approved by the Commissioners' Court", and that (R. 39, Par. 11) "while he made true and correct reports of all taxes collected by him * * * none of them, or any statement of the disposition thereof made by him, was ever approved by the Commissioners' Court".

While the court also found that (R. 40, 41, Par. 14) petitioner did not participate in Gayle's embezzlement, or have any knowledge of the shortage which resulted therefrom, or receive any benefit from his default, it concluded that (R. 43, Par. X) "defendant (petitioner) participated in Gayle's breach of trust on account of which, and their violations of contracts, and of law, and the consequent damage to complainant (respondent), it is entitled to recover from defendant (petitioner) the sum of $52,268.39", with interest.

We do not assert that petitioner applied to its own use any of the money that was, as against the deposits, by it wrongfully paid to Gayle, and by it wrongfully charged against the credits on account of the deposits, but we do assert that petitioner did participate in the default that caused the loss; and since the stipulated facts and findings and conclusions show that petitioner, by its wrongful acts, did participate therein, and that, but for its participation, the loss could not have occurred, we deny any implication to the contrary that may be suggested by petitioner's statement of the case (P. 2, Par. III.).

ARGUMENT

Petitioner contends (P. 8-10):

(1) That it did not participate in Gayle's shortage.

(2) That by statute it was authorized to make the charges on account of the payments made by it to Gayle on account of the checks drawn by, and payable to, him, and that it therefore is in the attitude of a depository for a trustee, for payments to whom it should not be held unless it received a benefit therefrom.

(3) That there was evidence sufficient to show a shortage of $14,562.56 in Gayle's highway fund account in another bank; that it was covered by the payments wrongfully made and charged by petitioner; that, otherwise, respondent would have been liable therefor; and that therefore petitioner is entitled to credit for that amount.

(4) That the bonds executed by respondent inured to petitioner's benefit; that, therefore, if petitioner had paid the loss to the State that arose from petitioner's and Gayle's default, it would be entitled to recover the same from respondent; and that, therefore, the judgment for respondent against petitioner is erroneous; and

(5) That petitioner had the right to permit Gayle to withdraw his commissions, and that it is entitled to credit therefor.

Petitioner presents no point relating to anything of substance; nor does it show that the Circuit Court of Appeals has decided any question of local law in a way probably in conflict with applicable local decisions.

Petitioner's Point 1 relates to nothing of substance because it is immaterial whether or not petitioner knew

of Gayle's shortage, or participated in his default by receiving a part of the proceeds thereof for its own use, or otherwise received a benefit therefrom, since its liability is based on its violation of statute in making unauthorized payments and charges therefor.

The District Court found that (R. 38, Par. 9):

> "Pursuant to statute requiring the Tax Collector to deposit all taxes collected by him in such depository as soon as collected, Gibson Gayle deposited with defendant, and received credit for, sums aggregating $4,468,250.45, including depository interest in the sum of $3,097.25, on account of taxes collected by him, of which he and it failed to account, according to law, for the sum of $52,268.39, which it paid to, or for the account of, Gibson Gayle, on checks not payable to treasurers entitled to receive the same or covering his compensation as shown by his approved reports, on account of which complainant, solely by reason of said bonds executed by it as surety for Gibson Gayle, as Tax Collector, became obligated to, and did, on the 9th day of November, A. D., 1935, pay $52,500.00 to the State of Texas, and $10.70 on account of Court costs, whereby it discharged all of the obligations of Gibson Gayle on account of his tax collectorship, whereupon it demanded payment of said sum of $52,268.39 from defendant, which failed and refused to pay the same, or any part thereof."

and that (R. 39, Par. 10):

> "Against the deposits on account of taxes collected by Gibson Gayle, as Tax Collector, and deposited with defendant, as County Depository, for McLennan County, Texas, and the credits therefor, defendant paid to, and for the account of, Gibson Gayle, sums aggregating $131,199.36, and charged the same against said credits, when his reports

had not been approved by the Commissioners' Court."

and concluded, that (R. 41, Par. III):

"On account of misapplications, by Gayle, and defendant, of credits representing taxes collected by Gayle as Tax Collector, and by him deposited with defendant, as County Depository, and their subsequent failure to account therefor, the State had the right to recover from them and complainant the sum of $52,500.00, which, in contemplation of law, represented defendant's obligation to the State, payable on demand, as it would have been if the unauthorized charges had not been made, and on account of which defendant has violated its depository contract."

and (R. 42, Par. IV):

"That complainant, having been compelled, solely on account of the bonds executed by it as surety for Gayle, to pay to the State the sum of $52,500.00 on account of said misapplications and defendant's violation of its depository contract, and the statute, and having paid the same on November 9, 1935, therby and thereupon became subrogee, and equitable assignee, of the State, entitled to its rights, remedies, and exemptions as against the defendant, and having thereupon demanded payment thereof from defendant, and having received on account thereof only $241.61, is entitled to decree and judgment against defendant for the sum of $52,268.39, with interest thereon at the rate of 6% per annum from the 9th day of November, A.D., 1935, until paid."

and (R. 43, Par. IX):

"That the payments of sums aggregating $131,199.36 to Gayle by defendant, against deposits on account of taxes were unauthorized and wrongful."

and that (R. 43, Par. X):

> "Defendant participated in Gayle's breach of trust on account of which, and their violations of contracts, and of law, and the consequent damage to complainant, it is entitled to recover from defendant the sum of $52,268.39, with interest thereon at the rate of 6% per annum from November 9, 1935, against which defendant is entitled to no relief by reason of its cross complaint, or by way of counterclaim, estoppel, setoff, waiver, or otherwise; and entry of decree and judgment accordingly is hereby directed."

The findings do not involve any necessary conflict; but as held in

Daniels v. Wight, 249 S. W. 454 (Tex. Com. App.—adopted by Sup. Ct.) and

Clyde Equipment Co. v. Fiorito, et al., 16 Fed. (2d) 106 (C.C.A.—9th),

if they were susceptible of different constructions, the construction that supports the judgment should prevail.

The argument (Br. 12) with respect to good faith and honesty of purpose is irrelevant, since it ignores the fact of the violation of statute, and the fact that, but for that violation, the loss could not have occurred.

The argument (Br. 12), with respect to alleged fault of the State and respondent, is irrelevant, since, as held in

First Nat. Bank v. Farrell, 272 Fed. 371 (C.C.A. 3rd);

Fidelity & Casualty Co. v. Farmers' Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833;

Wyatt & Wingo v. White, 228 S. W. 154 (Com. App. adopted),

no acquiescence or negligence with respect to petitioner's active violation of contract and law, and participation in breach of trust, could operate to relieve it from liability for the loss caused thereby; and since, as held in

Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865;

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607;

First Nat. Bank v. Farrell, 272 Fed. 371 (C.C.A. 3rd);

G. C. & S. F. Ry. Co. v. Donahoo, 59 Tex. 128;

Fidelity & Casualty Co. v. Farmers Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833,

no estoppel or equity could arise in favor of petitioner to absolve it from the effect of its own wrongful acts.

The argument (Br. 12), to the effect that the statutes necessarily authorized payments and charges on account of checks payable to Gayle, and that petitioner is therefore in the attitude of a depository for a trustee who had unlimited authority to withdraw funds, is irrelevant, since Art. 7250 had not been modified or repealed by any other statute, as we shall now undertake to show in discussing petitioner's Point 2.

Petitioner's Point 2 relates to nothing of substance because Art. 2535 related to state depositories exclusively, being a part of Chap. 1 of Title 47 of the Revised Statutes, and petitioner was county depository (R. 48, Par. 3) designated under Chap. 2 of Title 47 of the Revised Statutes, and Art. 2535 therefore is wholly irrelevant in this matter; and because Arts. 7331, 7332 related exclusively to fees (not taxes), and did not provide for any payment on account thereof by the Collector; and because Art. 7333 related exclusively to fees (not taxes), and it did not provide for any payment on account thereof by

the Collector, but merely for payment thereof from the proceeds of sale for delinquent taxes after the taxes were paid therefrom; and because Art. 7285 related exclusively to money received on account of property redeemed, which did not represent taxes, but funds held for payment to the purchaser at the tax sale; and because Arts. 7141 and 7142 related exclusively to fees on account of inheritance tax collections, for which there was no provision for payment by the collector; and because Art. 7132 related to nothing material in this matter; and because Art. 3891 related exclusively to disposition of fees (commissions), and did not authorize any use of taxes deposited until after the amount thereof representing compensation or fees had been withdrawn from the depository on approved reports of the collector; and because Art. 7336-f related to compilation of delinquent tax records and fees therefor (payable only on approved reports under Arts. 7250, 7260 and 7261—furthermore, Art 7336-f did not become effective until after Gayle had ceased to be Tax Collector); and because Arts. 7335 and 7335-a related exclusively to fees or compensation to be received by the county or district attorney, or other attorney, for delinquent tax collections, and did not provide for any payment by the tax collector; and because Art. 7264-a related exclusively to delinquent taxes, and did not provide for any payment by the collector; and because Art. 7264 related to the insolvent list, and did not purport to authorize any payment from the depository, or to affect, by implication or otherwise, the provisions of Art. 7250; and because Art. 6675-a—3b provided, not for any payment or refund in cash, but for issuance of a credit memorandum to be used for registration of another motor vehicle; and because Art. 3809f provided for no payment by the collector

except from fees after they had been received by him pursuant to approved reports.

With respect to Art. 6675-a—3b, petitioner refers only to Par. (A), which is set forth on page 41 of its brief, and it ignores Par. (C) thereof which expressly forbids any cash payment, and which is as follows, to wit:

> "(C) No refund provided for herein shall be made in cash, but a credit memorandum on a form to be prescribed by the Highway Department shall be issued for the amount of such refund, which shall be accepted by the Tax Collector for the face value thereof, by such person or his assignee on the registration of another vehicle for the current year, for which the destroyed or demolished vehicle was registered, but not otherwise. Such credit shall be allowed out of the county's part of said funds and not the State's. (Acts 1929, 41st Leg., 2nd C. S. p. 172, ch. 88, Sec. 3b, as added Acts 1931, 42nd Leg. p. 215, ch. 127, Sec. 1.)"

Petitioner presents no point with respect to Art. 3937 (p. 9), but it refers thereto on page 17 of its brief. However, any payment thereunder would be equivalent to a payment to a treasurer entitled to receive the same. Furthermore, under Art. 3938 (Acts of 1876, p. 272), payment on account of assessor's fees on proper orders had been thus provided for many years before the passage of Art. 7250, and Art. 7250 could not have been nullified by Art. 3937; on the contrary, Art. 7250 operated to modify Art. 3937 if both may not be given effect. Furthermore, petitioner has been credited for all payments to other officers, and this matter involves nothing except the loss caused by the unauthorized payments to Gayle.

The Circuit Court of Appeals disposed of several of these articles by holding that (R. 166, 167) the loss did not include any payment made under them, or any of them; but, as we have hereinabove shown, none of them conflicted with, or operated to modify, Art. 7250, and it is therefore obvious that there is no merit in petitioner's extended argument (Br. 13-25) to the effect that it should be treated as though it were involved in this matter only as a depository for a trustee who was authorized to withdraw funds against trust deposits without any limitation known to it, and that therefore the decision of the Circuit Court of Appeals is in conflict with the local decision in

Quanah A. & P. Ry. Co. v. Wichita State Bank & Trust Co., 127 Tex. 407, 93 S. W. (2d) 701.

Petitioner is rather in the attitude of a bank which has made payments on account of forged checks, or checks bearing only one signature when two were required, and charged the same to the account of the depositor, since the basis of its liability to the State, and, through subrogation, to respondent, is found in the breach by it of the duty prescribed by statute to make payments only to treasurers entitled to receive the same, and to the Collector for his commissions, as shown by his approved reports, which duty was imposed upon it by statute, of which it is bound to have had knowledge, and by which it is bound whether it had knowledge or not; or, in other words, it must be treated as having made charges on account of payments that were unauthorized because made contrary to the express direction of the depositor.

Petitioner's Point 3 relates to nothing of substance because there is no evidence sufficient to show that there was a shortage in the highway fund, much less a short-

age for which respondent would have been liable, but for the use made by Gayle of $14,562.56 of the payments wrongfully made by petitioner, since there was nothing to show whether or not Gayle had funds on hand in cash.

Mahon v. Kinney County, 28 S. W. 1024 (Tex. Ct. Civ. App.—writ ref.).

Furthermore, a payment by petitioner to cover such a shortage would have been for the benefit of Gayle, and the $14,562.56 was properly considered as part of the commissions for which he and petitioner received credit; and the point involves no suggested conflict with any applicable local decision.

Petitioner's Point 4 relates to nothing of substance because the bonds were not payable to, and did not in any way purport to be for the benefit of, petitioner, and they were given pursuant to Art. 7247, which provided for "bond for state taxes", and that the amount of the bond should be determined by the amount of state taxes assessed during the preceding year, and they were therefore obviously intended to be for the benefit of the State alone.

McRea v. McWilliams, 58 Tex. 328;
Clough v. Worsham, 74 S. W. 350 (Tex. Ct. Civ. App.—writ ref.);
Moody v. Megee, 31 Fed. (2d) 117; aff'd. 41 Fed. (2d) 515 (C.C.A.—5th—Texas);
United States v. National Surety Corporation, 309 U. S. 165, 84 L. ed. 677.

Furthermore, if the bonds had been payable to petitioner, or otherwise designed to inure to its benefit, it could have no right to recover from the surety thereon

for a loss caused, or contributed to, by its own wrongful acts.

> Fidelity & Deposit Co. of Md. v. Farmers' Bank, 44 Fed. (2d) 11 (C.C.A.—8th).

Art. 6003, relied on by petitioner, did not contain any provision for suit on an official bond "by the party injured" until it was amended by the Acts of 1935, page 657, Chap. 270, which became effective August 9, 1935, or more than seven months after Gayle's last term of office had expired, and is therefore not applicable in this matter.

There is no conflict between the decision of the Circuit Court of Appeals in this matter, and the decision of the Texas Court in

> Bordelon v. Philbrick, 84 S. W. (2d) 710,

because it involved a constable, and the liability of his surety for wrongful seizure under a writ of sequestration; or the decision in

> Tabor v. McKenzie, 49 S. W. (2d) 874,

because it involved a sheriff, and the liability of his surety for his wrongful official act; and, as stated by the Court in

> McRea v. McWilliams, 58 Tex. 328,

with respect to the sureties on a mail contractor's bond to the United States:

> "They are bound solely by the contract, and are responsible only to the party with whom the contract is made.";

and, with respect to the bonds of sheriffs, etc.:

> "The bonds of sheriffs, clerks, etc., seem to be an

exception to the general rule; but this is by express statutory provision."

Petitioner's Point 5 relates to nothing of substance because, as shown by an analysis of the stipulated facts, Gayle failed to deposit with petitioner on account of taxes collected the sum of $15,474.31; and his shortage was the result of his having appropriated to his own use that amount, and $131,199.36 wrongfully paid to him by petitioner, making a total of $146,673.67 for which he was chargeable in his accounting with the State, in which he was entitled to, and received, credit for $93,839.33 on account of commissions, and the difference, or $52,834.34, represented his shortage, for which petitioner, as well as he, was primarily liable, since the unauthorized charges made by petitioner exceeded the amount of the shortage, and since, as held in

First National Bank of Chicago v. Newhouse, 17 Fed. (2d) 228 (C.C.A.—7th);

Linscott v. Fidelity & Deposit Co. of Maryland, 145 Pac. 868 (Kan.),

both being wrongdoers, the credit due him should not be applied to reduction of the charges involving petitioner alone, but should be applied against the charges generally.

The opinion of the witness, Kleyboecker, relied on by petitioner (Br. 37) as showing that Gayle failed to deposit $39,351.95, is of no consequence as against the stipulated facts. Furthermore, his opinion contemplated only "taxes in the form collected", to the exclusion of deposits in the form of checks into which money representing taxes in the form collected had been converted by the cashing of checks before making deposits. However, in determining petitioner's liability, it is chargeable with

the amount of all funds received and credited by it, as county depository; and, as held in

> Central National Bank of Baltimore v. Conn. Mut. Life Ins. Company, 104 U. S., 14 Otto, 54, 26 L. ed. 693,

it is immaterial whether it received the identical money collected from the taxpayers, or that which Gayle had substituted therefor.

The credits on account of the deposits belonged to the State, County, and schools.

> Austin v. Kiser, 277 S. W. 411 (aff'd. 286 S. W. 1082—Comm. App. adopted by Sup. Ct. of Texas),

and, with respect thereto, petitioner could have "no equity equal to that of the real owner".

> Maryland Casualty Company v. City Nat. Bank, 29 Fed. (2d) 662 (C.C.A.—6th).

There is no merit in petitioner's assertion (P. 3) to the effect that it acted innocently in crediting all deposits to the collection account, and that it believed that it was authorized to do so by the opinion of the attorney general (R. 72-74) based on

> State v. Harvey, 15 S. W. (2d) 82,

especially since it thereby evaded payment of interest for a period of several days (R. 72, Par. 27), because that opinion suggested the contrary, since petitioner was thereby advised that, upon giving credit for a deposit, it would become liable for interest on account thereof, as well as for the amount of any not good checks which might be included therein; and because, by the evading of interest in that way, petitioner did receive a benefit, as held in

Fidelity & Casualty Company v. Farmers' Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833.

There is no merit in petitioner's assertion that it did not violate the law, since Art. 2549 of the Revised Civil Statutes of Texas, 1925, provided for a county depository, and that

> "It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository * * *, as soon as collected, pending the preparation of his report of such collections and settlement thereon, * * *"

and Art. 7250 thereof provided that:

> "Except as to compensation due such tax collector as shown by his approved reports, tax money deposited in county depositories shall be paid by such depositories only to treasurers entitled to receive the same, on checks drawn by such tax collector in favor of such treasurer."

and, by Art. 7260 thereof, the collector was "at the end of each month" required to "make an itemized report under oath to the comptroller, showing each and every item of * * * taxes collected by him during said month accompanied by a summarized statement showing full disposition of all state taxes collected," and to "present such report, together with the tax receipt stubs, to the county clerk" for examination, and, by Art. 7261 thereof, he was required to, "at the end of each month, make like reports to the Commissioners' Court of all collections made for the county," and, by paragraph 4 thereof, it was provided that:

> "At the next regular meeting of the commissioners court, the tax collector shall appear before said

> court and make a summarized statement, showing the disposition of all moneys, both of the State and county, collected by him during the previous three months. Said statement must show that all taxes due the State have been promptly remitted to the State Treasury at the end of each month, and all taxes due the county have been paid over promptly to the county treasurer and shall file proper vouchers and receipts showing same."

and, by paragraph 5 thereof, it was provided that:

> "The commissioners court shall examine such statement and vouchers, together with an itemized report and tax receipt stubs filed each month, and shall compare the same with the tax rolls and tax receipt stubs. If found correct in every particular, and if the tax collector has properly accounted for all taxes collected, as provided above, the commissioners court shall enter an order approving said report, and the order approving same shall be recorded in the minutes."

from which it is clear, as held by the Circuit Court of Appeals in this case, and by the El Paso Court of Civil Appeals in

> New Amsterdam Casualty Company v. First National Bank of Gilmer, 134 S. W. (2d) 470,

in which the Supreme Court of Texas dismissed application for writ of error "for want of jurisdiction—correct judgment", that petitioner violated Art. 7250 in charging against the deposits payments made by it to Gayle on account of checks drawn by, and payable to, him, not covering his compensation, as shown by his reports approved by the Commissioners' Court (none having been approved by that court), and that petitioner should reimburse respondent for the resulting loss.

It is immaterial whether or not petitioner participated

in the default by receiving a benefit therefrom, since, to the extent of the amount of respondent's loss, the charges, made by petitioner against the deposits, supported, as they are, only by checks drawn by, and payable to, the Collector, cannot be sustained, and petitioner remains liable to the extent thereof precisely as it would be if they had not been made.

New Amsterdam Casualty Company v. First National Bank of Gilmer, 134 S. W. (2d) 470;
Watson v. El Paso County, 202 S. W. 126 (Tex. Ct. of Civ. App.);
Fidelity & Casualty Co. v. Farmers' Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833;
Leather Manufacturers Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. ed. 342;
United States v. Nat. Bank of Commerce, 205 Fed. 433 (C.C.A.—9th).

There is no merit in petitioner's assertion (Br. 36) that "it has fully accounted for all of the moneys included in the item of $131,199.36", since, as hereinabove shown, Gayle has received credit for $93,839.33 on account of commissions, and petitioner has received credit therefor except as to the $15,474.31 which he had not deposited, but had retained as against commissions, with respect to which $15,474.31 petitioner was therefore not entitled to credit, and since, as stated by the Court on the first appeal (100 Fed. (2d) 807):

> "The proof as to deposits and withdrawals amounted * * * to this; * * * that crediting him (Gayle) on all his accounts with all of his commissions, and all other proper charges, he had accounted for all the moneys he had collected except $52,268.39, the amount in controversy";

and since, as already pointed out, there is no evidence

sufficient to show that there was a shortage of $14,562.56 in the highway fund; and since, as already shown, it is immaterial whether $23,877.66 of the deposits received and credited by petitioner, or any other amount, represented taxes deposited in the form collected, or in some other form.

It is therefore submitted that there is no merit in any point suggested by petitioner; that the decision of the Circuit Court of Appeals does not, in any particular, conflict with any applicable local decision, or with any applicable local statute; that the decision is a correct and proper one, and should not be disturbed, and that the petition for writ of certiorari should be denied.

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